

**BEFORE THE
INDIANA ALCOHOLIC AND TOBACCO COMMISSION**

**IN RE DÉJÀ VU SHOWGIRLS OF)
HAMMOND, INC,)
PERMIT NO. RR45-19284)**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 18, 2001 the Indiana Alcoholic and Tobacco Commission (Commission) upheld a unanimous vote of the Lake County Local Board denying the application of Déjà vu Showgirls of Hammond, Inc. (Déjà vu) for an alcohol permit. Déjà vu's appealed that decision, and the Commission assigned Hearing Judge J. C. Buehler to conduct the appeal proceedings.

The appeal was heard in Indianapolis on June 20, 2002. Witnesses were sworn, exhibits admitted and evidence heard. The matter was taken under advisement upon adjournment.

Summary of the Ruling

Upon consideration of the evidence, the Hearing Judge finds that the unanimous vote of the Lake County Local Board to deny the permit application of Déjà vu should be upheld as supported by substantial evidence and otherwise in compliance with I.C. 7.1.

Background of the Case

Applicant Déjà vu is the Hammond location of an adult entertainment franchise business. Another Deja vu franchise, also located in Lake County (Lake Station, Indiana), currently operates with a Commission permit.

Company franchises located in Illinois and Florida also hold alcohol permits of some kind. No evidence was presented as to the number of Déjà vu franchise operations conducting business without alcohol beverage permits.

Lori Strom-Stewart is the franchisee, and operator of both Lake County Déjà vu locations.¹ The present application was filed to permit alcoholic beverages to be served to customers of the Hammond location. The Commission previously found Ms. Strom-Stewart to be qualified to hold a permit at the Lake Station location, and nothing in the present record indicates that she does not remain so qualified.

The Local Board heard Déjà vu's application on September 6, 2001. Several remonstrators appeared to testify against the permit. Their testimony is generally summarized as follows: objections to the number of permit locations presently in the community; the lack of desire for additional permits; and general objections to the issuance of a permit to a 'sexually-orientated' business. While several remonstrators voiced concerns before the Local Board and on appeal about the mere existence of an adult entertainment or "strip club" in the community, such establishments may lawfully hold alcohol permits, subject to the Commission's rules and regulations. Neither a local board, nor the Commission may deny a permit to an otherwise qualified applicant solely on the basis that "adult entertainment" is provided on the premises. Such entertainment, whether

¹ The Lake Station operation is not a party to this appeal.

called ‘artistic dance’ or ‘nude dancing’ is entirely legal and constitutional under both Indiana and federal law, within certain well-established statutory bounds.²

Several procedural matters arose before the fact-finding and appeal hearing were completed.

The Commission’s jurisdiction to hear the appeal was challenged. Déjà vu filed its appeal on October 31, 2001. Commission records indicate that the appeal process was handled in the regular manner and course of business. On February 28, 2002, Remonstrator Deborah Moyer moved to dismiss the appeal³ alleging that Déjà vu’s appeal was untimely and that the Commission was therefore without jurisdiction to act upon it. Déjà vu opposed the motion and the parties filed briefs on their respective positions. On April 30, 2002, the Hearing Judge denied the motion after finding that the appeal was timely.⁴

Another procedural matter concerned the procedures governing and timeliness of discovery. The first appeal hearing was continued without objection to facilitate resolution of procedural motions. Some time later, Déjà vu requested the continuance of the second appeal hearing stating that it (applicant) was surprised by the number of remonstrators appearing to testify at the Local Board proceedings in September 2001. Déjà vu sought to delay the second hearing to

² It appears from the record that Applicant Déjà vu complies with all state and local laws relating to the provision of adult entertainment, and is otherwise not a public nuisance.

³ “Failure of the applicant...to file objections and a petition for intervention within the fifteen (15) day period shall constitute a waiver of any appeal hearing from the commission’s action.”

⁴ The Commission’s authority to consider the appeal of a matter within its exclusive, statutory purview was not impacted notwithstanding Moyer’s argument that the body lacked “jurisdiction” to consider the appeal. The appeal-filing delay was attributable to a minor administrative or clerical error at the Commission that was not chargeable to, or the responsibility of Déjà vu.

depose various remonstrators “over a period of three to four weeks”. The Hearing Judge denied that motion on June 12, 2002.⁵

Discussion

Contrary to the position of certain of the remonstrators, this appeal and the Commission’s action, do not turn on the ‘acceptability’ of adult entertainment in Lake County (and the extent to which that affects an applicant’s qualifications). Nor does the appeal deal with normative considerations of whether the applicant here ought to hold an alcohol beverage permit. Those considerations are for the Indiana legislature.⁶ Instead, the record demonstrates two overarching factors in the Local Board’s denial of Déjà vu’s permit: the local community’s lack of desire for the proposed services; and, the impact that granting the permit would have on that community.

The Commission is charged to uphold local board action on a permit application unless upon review that action runs afoul of the well-established provisions of Indiana Code 7.1 and 905 IAC. When reviewing the local board action the Commission can, and should, view the record of proceedings as a whole in light of, *inter alia*, the need for the proposed services the permit location; the desire of the community to receive such services; the impact of such services on the neighborhood or community; and, whether granting the permit is in the best interest of the public. Those elements, applied to the present record,

⁵ Applicant’s motion to strike the written of submission of Mr. Joseph Hero was taken under advisement at the close of the appeal hearing. That motion is denied. The submission is made part of the record.

⁶ Indeed, the Commission oversees the compliance of many qualified permit-holding adult entertainment businesses.

affirm that the Local Board's denial of the Déjà vu permit was adequately supported by substantial evidence, on at least two bases.

First, substantial evidence in proceedings before the Local Board and the Hearing Judge establish that the community does not need the proposed services. The Déjà vu permit was proposed for the Hessville area of Hammond, which presently hosts a high concentration of permit premises: some twenty (20) taverns and three (3) retail package stores are located within a 3 to 4 square mile area. While that concentration of permit premises is not *ab initio* disqualifying, it does substantially bolster and validate the credible testimony of numerous remonstrators that the community simply does not need another alcohol permit location in the area.

Next, the substantial evidence demonstrates that the community does not desire the proposed services. Most remonstrators objected to the addition of another alcohol permit in the area, and the evidence on that point was credible and persuasive. The general objection, or concern, by some remonstrators over combining Déjà vu's adult entertainment with the alcohol permit was, in the opinion of the Hearing Judge, secondary not only to the deleterious impact to the area or community if the permit were granted, but also secondary to well-voiced concerns over what one witness termed the area's 'saturation' by alcohol-serving establishments.

To be sure, the community's concerns over the *need* for the proposed permit are intertwined with its desire for the proposed services. That does not change the substantial evidence demonstrating that the Local Board well considered both the lack of need and *desire* for the proposed services. The

community's overriding sentiment that the services to be provided by Déjà vu permit was both unwanted, and unneeded were exemplified by the testimony of Mr. Jim Dowling, Hammond District 6 Councilman, and, further, by a vote of the Hammond Common Council.

The Hearing Judge credited Mr. Dowling's testimony to be relevant and substantial. A lifelong Hammond (and Hessville) resident, the son of a former Hammond mayor, and himself a former Chief of Police, Mr. Dowling has long known, and represented the community. It appears eminently clear from his testimony, as well as from the record before the Local Board that the community does not desire or need the services of the proposed permit.

The unanimous vote of the Hammond Common Council recommending denial of Déjà vu's application, while not dispositive of the issue before the Commission, was additional, substantial evidence of the lack of need, or desire for the proposed services in the community. It is reasonable to assume that this local legislative body mirrors the mood and sentiment of the community as a whole, as found to be the case here. While local governing bodies are statutorily prohibited from exercising 'home rule' to regulate alcohol permits⁷ the Council's unanimous' non-binding vote, taken together with other evidence in the record, nonetheless constitutes substantial evidence supporting the Local Board action denying the application.

The Applicant failed to offer persuasive, substantive evidence to counter the cited substantial evidence in the record as a whole.

⁷ A governmental entity may not regulate conduct that is regulated by a state agency, e.g. the Alcohol and Tobacco Commission authority on alcohol permits. See I.C. 36-1-3-8

Upon consideration of the evidence, the Hearing Judge finds that substantial evidence supports the denial of the Déjà vu's application.

Evidence at the Hearing

Numerous witnesses testified at the hearing. While the names and a summary of the witness' testimony are normally included in the opinion and decision, it is sufficient to note here that the names and addresses of the witnesses are included in the Commission file and record of proceedings. Individual testimony is identified and summarized as needed.⁸

The numerous exhibits submitted into evidence are also included in the Commission file and record of proceedings. The Hearing Judge reviewed, and took notice of the entire Commission file, including the transcript of the proceedings before the Local Board, and the exhibits submitted at the appeal hearing.

Findings of Fact

1. The Hearing Judge took official notice of the Commission file, and Local Board transcript per 905 I.A.C. 1-36-7(a). (LB Tr.; ATC File)
2. The Lake County Local Board voted unanimously on to deny the transfer of the Type 210 permit to the Applicant, Déjà vu Showgirls of Hammond, Inc. (LB Tr.; ATC file).
3. Persuasive, credible evidence supports the Local Board action. (LB Tr.; ATC file).

⁸ Applicant's "Motion to Strike Portions of Remonstrator's Proposed Findings of Fact and Conclusions of Law" filed July 26, 2002 is granted in part. The Hearing Judge disregarded the irrelevant and otherwise prejudicial or unnecessary submissions by remonstrators. While the Commission has wide discretion to admit evidence into the record of proceedings, it has not and will not rely on motions outside the scope of the inquiry required by I.C. 7.1-3-19-11(a).

4. The transfer of the permit is allowable under Commission quotas.
(ATC file)

5. The Commission may, as part of its statutory charge to investigate a permit issuance or transfer in regard to its proposed geographical location, consider or determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the proposed permit location on the community and neighborhood and on area businesses. Substantial evidence in the record as a whole supports the Local Board's action denying the permit to applicant and, further, that the neighborhood and community do not need or desire the proposed services. (LB Tr.; ATC file)

6. The community and neighborhood would not benefit from the transfer of the permit. (Ex. 1; LB Tr.)

7. The testimony of the remonstrating witnesses was credible and persuasive.

8. The facts and substantial evidence favor supporting the permit denial.

9. Déjà vu's application was unanimously rejected by the Lake County Local Board.

10. Déjà vu's appeal of the Lake County Local Board action was timely.

Conclusions of Law

1. The Hearing Judge may take official notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 I.A.C. 1-36-7 (a).

2. Déjà vu's application was unanimously rejected by the Lake County Local Board.

3. Déjà vu's appeal of the Lake County Local Board action was timely.

4. The Commission has, and retained, the exclusive jurisdiction to hear Déjà vu's appeal of the Local Board action.

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. I.C. 7.1-3-19-11 (a); 905 I.A.C 1-36-7(a), -37-11 (e) (2); *see also*, I.C. 4-21.5-3-27 (d).

6. An application for transfer of a permit is treated the same for purposes of investigation of an original application for a permit. I.C. 7.1-3-24-3.

7. Evidence at the hearing was received, to the extent applicable, in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 I.A.C. 1-37-11 (e) (2); I.C. 4-21.5-3-27 (d).

8. Substantial evidence is the standard to be applied by the Commission in review of the record of proceedings. Substantial evidence requires something more than a scintilla, and less than a preponderance of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Fire Prevention v. Rose Aere Farms* 530 N.E.2d 131, 133 (Ind. App. 1988); *Indiana Alcoholic Beverage Comm. v. River Road Lounge* 590 N.E.2d 656 (Ind. App. 1992).

9. Based on the record as a whole, the Local Board's vote to deny the permit to Déjà vu is based on reasonably sound evidentiary support, and is, therefore, supported by substantial evidence. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.* 615 N.E.2d 100, 104 (Ind.App. 1993). The record evidence, and logical inferences therefrom, support the administrative determination to deny the transfer of the permit, See *Malone Enterprises, Inc. v. Schaeffer*, 674 N.E.2d 599, 606 (Ind. App. 1996); and a reasonable basis for the decision exists. *Chesser v. City of Hammond*, 725 N.E.2d 926, 930 (Ind.App.2000).

10. The Commission may investigate a permit issuance or transfer in regard to its geographical location; determine the need for such services at the proposed location; the desire of the neighborhood or community to receive such services; and the impact of the proposed permit location on the community and neighborhood and on area businesses. 905 I.A.C 1-27-4.

11. Viewed as a whole, the record demonstrates that the community does not need or desire the services proposed.

12. Substantial evidence shows that the transfer of the permit is not in the public's best interest. 905 I.A.C. 1-27-4 (a); I.C. 7.1-3-19-10.

13. The Commission shall follow the recommendation of the Local Board unless upon review of that recommendation it finds that to follow that recommendation would be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory

jurisdiction, authority, limitations or rights; (4) without observation of procedure required by law; or (5) unsupported by substantial evidence. I.C. 7.1-3-19-11 (a).

14. The recommendation of the Local Board to approve the transfer of the permit was not arbitrary, capricious, or an abuse of discretion.

15. The Local Board's action was not contrary to a constitutional right, power, privilege, or immunity.

16. The recommendation of the Local Board to deny the permit to Déjà vu and was supported by substantial evidence. *Id.* The record does not demonstrate any legal basis on which to subvert the Local Board recommendation. *Id.*

17. The law favors upholding the recommendation and vote of the Local Board to approve the transfer of the permit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Lake County Local Board recommendation to deny the application of Déjà Vu's Showgirls of Hammond, Inc. Permit No. RR 45-19284 be, and hereby is, upheld, and the appeal denied. The transfer of the permit is DENIED.

DATE: _____

J. C. Buehler, Hearing Judge
Indiana Alcoholic and Tobacco Commission